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Attorneys for Secured Creditors  
David Vial and Bruce Comstock

(Moscow)

IN RE: ) Bkcty. No. 03-21652  
 )  
GERALD AND ONA LINDSEY, ) Chapter 7  
 )  
Debtors. )  
 ) RESPONSE TO DEBTORS'  
 ) OBJECTION TO COMSTOCK/VIAL  
 ) MOTION FOR RELIEF  
 ) FROM AUTOMATIC STAY

1. Debtors' Objection appears to set forth two legal arguments (with no citation to legal authority). First, Debtors argue that Vial and Comstock are general unsecured creditors.

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The Debtors seem to reach this conclusion by arguing that when Vial and Comstock obtained the Summary Judgment on May 23, 2003, in the District Court of the Second Judicial District of the State of Idaho, In and For the County of Idaho, Case No. CV 02-33546, they waived their right to foreclose on the real property owned by the Cornerstone Ranch, LC, located in Nevada (the "Nevada Real Property"). Second, Debtors argue that since the Trustee has obtained a default judgment against Cornerstone Ranch, LC, the Nevada Real Property is property of the Bankruptcy Estate and it is prejudicial to unsecured creditors to grant the relief motion at issue. As set forth below, the Debtors' objections have no merit.

2. First, it is significant to note that the Debtors do not object or contest the following facts set forth in the Relief Motion filed by Vial and Comstock on September 27, 2004 ("Relief Motion"):

1. On or about June 7, 2000, Gerald A. Lindsey ("Lindsey"), a Debtor herein, and Noel S. Tanner ("Tanner"), entered into an Agreement with Vial and Comstock, wherein Lindsey and Tanner purchased the entire 500 shares of Clara Bea, Inc. and all inventory of that company, which included 105 items of gold mining equipment, including a 1986 D7G Caterpillar Tractor. Pursuant to that Agreement, Lindsey and Tanner agreed to pay a down payment of \$25,000, with a balance of \$100,000 due January 15, 2001. In the Agreement, Lindsey and Tanner granted a lien on the Nevada Real Property to secure the remaining \$100,000 due and owing under the Agreement. Attached hereto as Exhibit A is a true and correct copy of the Promissory Note and Agreement.

2. The Agreement was recorded in the office records of Nye County, Nevada, as Instrument No. 495640 on June 29, 2000. Attached hereto as Exhibit B is a true and correct copy of the Nye County recorded document.

3. Lindsey and Tanner defaulted under the terms of the Agreement and failed to pay the \$100,000 payment due and owing to Vial and Comstock on January 15, 2001. Thus, Vial and Comstock filed an action against Lindsey and Tanner, and on June 9, 2003, received a Judgment against Lindsey and Tanner in

the principal sum of \$137,961.25, with interest accruing thereon at the statutory rate. On June 26, 2003, the Judgment was duly recorded in the County of Idaho.

4. The Debtors have no equity in the Collateral. As of October 15, 2003, as set forth in the Proof of Claim filed in the Debtors' bankruptcy case, the Debtors owed Vial and Comstock the sum of One Hundred Fifty Thousand One Hundred Twenty-Five Dollars and Twenty-Four Cents (\$150,125.25), which continues to accrue interest at \$27.21 per diem, as well as attorney fees and costs. Vial and Comstock have received no payment on the Judgment. Upon information and belief, the fair market value of the Nevada Real Property is less than \$20,000. ...

5. Absent the filing of said Chapter 7 proceeding, Vial and Comstock would have foreclosed on their lien on the Nevada Real Property for Lindsey and Tanner's default of the Agreement. Unless this Court permits Vial and Comstock to proceed with an action to foreclose on its lien, Vial and Comstock will suffer great and irreparable damage and injury by reason of the fact that they are not receiving any payments.

The Debtors simply do not contest that the Debtors granted a lien in the Nevada Real Property; pursuant to an agreement of which the Debtors have defaulted; that the lien was duly recorded; and that the Nevada Real Property lacks any equity for the benefit of general unsecured creditors or the Debtors<sup>1</sup>.

3. Debtors inaccurately state that Vial and Comstock are general unsecured creditors. Vial and Comstock are clearly secured creditors as the Debtors granted a lien in the Nevada Real Property to Vial and Comstock to secure the outstanding obligation owed to Vial

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<sup>1</sup> In fact, in reviewing the Summary Judgment Order attached as Exhibit A to the Affidavit of Brit Groom, the trial court also noted that "there were no factual disputes between the parties. Defendants do not dispute the existence or validity of the promissory note or the written agreement". See page 5 of Exhibit A.

and Comstock for the purchase of Clara Bea, Inc. and its inventory<sup>2</sup>. *See Exhibit B to the Relief Motion*. The Debtors provide no facts to the contrary.

3. In the Summary Judgment Order cited by the Debtors, the Court specifically noted that "Defendants [Debtors] entered into a legally binding contract to pay Plaintiffs [Vial and Comstock] One Hundred Thousand Dollars (\$100,000.00), evidenced by the promissory note. Defendants are in default of the note. **The agreement executed by the parties provided that Defendants' Nevada property serve as security for the debt by placement of a lien.**" *See Exhibit A to Affidavit of Brit Groom in Support of Debtors' Objection to Motion for Relief From Stay ("Exhibit A")*; p. 15, emphasis supplied.

4. Although no legal authority is cited, the Debtors appear to argue that Vial and Comstock are unsecured creditors and not entitled to foreclose on the Nevada Real Property because they obtained a money judgment against the Debtors instead of foreclosing on the Nevada Real Property. This argument is contrary to Idaho law. Idaho Code § 6-101, commonly referred to as the One Action Rule, states:

There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate which action must be in accordance with the provisions of this chapter.

Idaho Code § 6-101(1). Nevertheless, Idaho Code § 6-101 goes on to state:

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<sup>2</sup> Furthermore, Vial and Comstock were granted summary judgment against the Debtors on May 23, 2003 (the "Summary Judgment"). The Judgment obtained by Vial and Comstock as a result of the Summary Judgment was recorded in the real property records of Idaho County on or about June 26, 2003, as Instrument No. 0429740. Upon the recording of the Judgment in the real property records Vial and Comstock became judgment lien creditors. The judgment lien attached upon all real property of the Debtors. Vial and Comstock are not general unsecured creditors in any sense.

As used in this section, an "action" does **not include** any of the following acts or proceedings: (c) To enforce a mortgage or lien upon any real or personal property collateral located outside of this state which is security for the same debt or other obligation.

Idaho Code § 6-101(3)(c), emphasis supplied. Further, in the Summary Judgment Order, the State Court specifically stated:

Plaintiffs are **not**, however, obligated to look first to the security, **nor** are they obligated under the agreement to look solely to the security, but may instead seek a judgment in the amount of the default on the terms of the promissory note. Plaintiffs are entitled by law to judgment in the amount of One Hundred Thousand Dollars (\$100,000.00) plus interest and attorney fees consistent with the agreement.

See Exhibit A, p. 15, emphasis supplied. It is beyond refute that under Idaho law a creditor is entitled pursue a money judgment prior to foreclosing upon out of state real property. Idaho Code § 6-101.

5. Lastly, the Debtors assert that the Trustee obtained a default judgment against Cornerstone Ranch, LC, and therefore the property should be liquidated for the benefit of all unsecured creditors. The Debtors' argument ignores the fact that the Trustee expressly excluded a default against David Vial and Bruce Comstock (*See Docket Entry No. 251 in Adversary Proceeding No. 04-6098*) and that the Trustee, on behalf of unsecured creditors, takes the property subject to all valid liens. e.g. 11 U.S.C. § 363 (d), (c), (f). It is noteworthy that the Trustee did not object to the relief motion filed on behalf of Vial and Comstock.

The Debtors' Objection at the last minute is contrary to Mr. Britt's statements to counsel for Vial and Comstock that the Debtors had no objection to the motion and would execute a stipulated order for relief. Vial and Comstock respectfully request that the Debtors' Objection be denied at the preliminary hearing and that Vial and Comstock are not subject to any further delay by the Debtors' tactics.

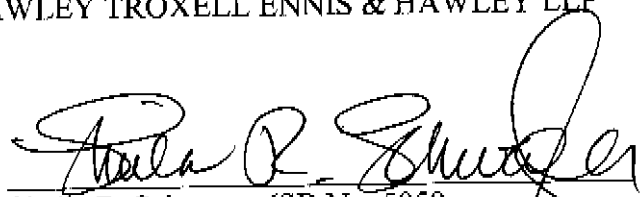
RESPONSE TO DEBTORS' OBJECTION TO COMSTOCK/VIAL MOTION FOR  
RELIEF FROM AUTOMATIC STAY - 5

WHEREFORE, Vial and Comstock pray that they be granted relief from the automatic stay as to the Nevada Real Property so that they may foreclose upon their lien pursuant to state law, and that they have such other and further relief as is just.

DATED THIS 29th day of October, 2004.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By

A handwritten signature in black ink, appearing to read "Sheila R. Schwager", is written over a horizontal line.

Sheila R. Schwager ISB No. 5059

Attorneys for David Vial and Bruce Comstock

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2004, I caused to be served a true copy of the foregoing RESPONSE TO DEBTORS' OBJECTION TO COMSTOCK/VIAL MOTION FOR RELIEF FROM AUTOMATIC STAY by the method indicated below, and addressed to each of the following:

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RESPONSE TO DEBTORS' OBJECTION TO COMSTOCK/VIAL MOTION FOR  
RELIEF FROM AUTOMATIC STAY - 7

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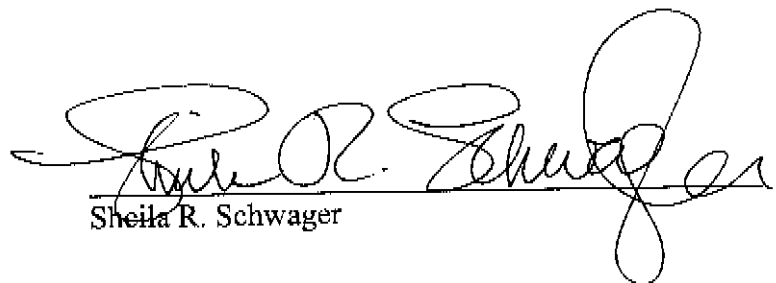
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